

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2002-022618

11/03/2003

HON. THOMAS DUNEVANT, III

CLERK OF THE COURT
K. Ballard
Deputy

FILED: 11/06/2003

K B S PHOENIX IV L L C

MARY GRACE MCNEAR

v.

RADACOSKY & SHANKER P L C, et al.

DANIEL J RADACOSKY
RICHARD A KASPER

RULING

9:32 a.m. This is the time set for oral argument regarding the Rule 60(c) Motion for Relief from Dismissal Without Court Order filed by the individual Defendants Gregory C. Tishkoff and Nicole Tishkoff. No other part is present or represented.

A record of the proceedings is made by CD/videotape in lieu of a court reporter.

The Court addresses counsel regarding the motion.

Oral argument is presented.

The Court informs counsel that it will issue its ruling by minute entry. However, the Court states certain findings on the record at this time.

The comments/findings of the Court stated on the record this date shall be incorporated in the Court's ruling contained later in this minute entry.

9:47 a.m. Matter concludes.

LATER:

SUPERIOR COURT OF ARIZONA
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The Court has considered the Tishkoff Defendants' Motion for Relief from Order of Dismissal Without Court Order, the briefs submitted, and the oral arguments of counsel. The Court finds and rules as follows:

Rule 41(a), Ariz.R.Civ.P., allows a plaintiff to voluntarily dismiss its lawsuit at any time before an adverse party serves an answer or a motion for summary judgment. A notice of dismissal is self-executing, and there is no need for notice to the adverse party, a hearing, or an order of the Court. *Goodman v. Gordon*, 103 Ariz. 538, 447, P.2d 230 (1968). *See also Pedrina v. Chun*, 987 F.2d 608 (9th Cir. 1993).

Moreover, Rule 60(c) does not provide the Tishkoffs with a basis for relief from the entry of judgment. The burden of proving misrepresentation or fraud, or any allegation under Rule 60(c) "is on the party moving to vacate, and is not to be presumed, but must be established by clear and convincing evidence." *Lake v. Bonham*, 148 Ariz. 599, 716 P.2d 56 (App. 1986). The Tishkoffs have not carried this burden. Much of the factual circumstances surrounding the instant motion are in dispute.

IT IS ORDERED denying the Tishkoff Defendants Motion for Relief from Order of Dismissal.